NOS. 135 and 198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 135.

THE UNITED STATES, *Petitioner*,

v.

ALFRED W. JONES, Receiver for Georgia and Florida Railroad.

No. 198.

ALFRED W. JONES, Receiver for Georgia and Florida Railroad, *Petitioner*,

v.

THE UNITED STATES.

On Writs of Certiorari to the Court of Claims.

BRIEF IN REPLY FOR THE PLAINTIFF, ALFRED W. JONES, RECEIVER FOR GEORGIA AND FLORIDA RAILROAD.

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Filed February 2, 1949.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statute	4
Statement	5
Summary	10
Defendant's Propositions	10
Argument:	
On the Facts	17
On the Law	20
Defendant's Specification 1	20
Defendant's Specification 2	27
Defendant's Specification 3	30
Defendant's Specification 4	38
Defendant's Specification 5	38
Defendant's Specification 6	39
Plaintiff's Specification 1	41
Plaintiff's Specification 2	44
Statute of Limitations	46
Exhaustion of Administrative Remedies	69, 46
Defendant's Conclusion	51
Plaintiff's Conclusion	52
Appendix A—Railway Mail Pay Act	55
Appendix B—Opinions of District Court	60
Appendix C—Corroboratory Argument on the Facts	68

CITATIONS.

CASES: Page

Albert Hanson Lbr. Co., 261 U.S. 581 40
Atch. Top. & S. F. R. Co. v. U. S., 284 U.S. 248 48
Am. Safety Razor Co. v. U. S., 6 Fed. Supp. 293 ... 48, 50
Atlantic Coast L. R. Co. v. U. S., 132 Fed. 2d 959 ... 46
Ayrshire Coll. Corp. v. U. S., No. 25, Oct. Tm. 1949, U.S. 34
Balt. & Ohio v. U. S., 298 U.S. 351 75
Bowles v. Willingham, 321 U.S. 503 37
Bloomington Cg. Co. v. Union Gas Co., 94 Ill. App. 62 74
City of Richmond v. I. J. Smith Co., 119 Va. 198 74
Danforth v. U. S., 308 U.S. 271 46
Fred R. Comb Co. v. U. S., 103 Ct. Cl. 174 100
Griffin v. I.C.C. and U.S., In Equity 207, Jan. 23, 1933 ..... 2, 7, 27, 60
Griffin v. I.C.C. and U.S., In Equity 228, Feb. 22, 1937 ..... 2, 7, 19, 29, 62, 63, 74
Griffin v. U. S., (Ct. Cl.), 77 Fed. Supp. 197 ... 1, 8, 19, 26, 27, 31, 37, 44, 45, 46, 74, 78, 81, 84
J. E. Irvine & Co. v. U. S., 10 Fed. Supp. 1019 50
Jacobs & Co. v. U. S., 290 U.S. 13 ..... 22, 43
Jones v. U. S., 5 Fed. Supp. 146 ..... 49, 50
Kieselback v. Commission, 317 U.S. 399 43
Klamath Indians v. U. S., 304 U.S. 119 43
Liggett & Myers v. U. S., 274 U.S. 215 43
McKesson & Robbins v. Edwards, 57 Fed. 2d 147 .. 49, 50
Mo. Pac. R. Co. v. U. S., 271 U.S. 603 21
Monongahela Nav. Co. v. U. S., 148 U.S. 312 .. 22, 26, 40, 42
New York Central v. U. S., 65 Ct. Cl. 115 .... 21, 22, 23, 47
New York, N. H. & H. R. Co. v. U. S., 251 U.S. 123 .. 13, 14
New England Divns. Case, 261 U.S. 184 37
North Am. Tr. & Tr. Co. v. U. S., 253 U.S. 330 22
Olson v. U. S., 292 U.S. 246 79
Pacific Mills v. Nichols, 72 Fed. 2d 103 49
Parks v. Boston, 15 Pick. 198 46
Pierce Arrow Mot. Car Co. v. U. S., 9 Fed. Supp. 577 50
Ross v. Keaton Tire, Etc., 57 Cal. App. 50 73

Railway Mail Pay:

Ala. Tenn. & Nor., 112 I.C.C. 151 80
Denver & Salt Lake, 151 I.C.C. 734 104
First General, 56 I.C.C. 1 ..... 77, 83

Page

Second General, 144 I.C.C. 675 ..... 6, 21, 47, 68, 80, 104
Interhountain & Pacific Coast Lines, 96 I.C.C. 493, 151 I.C.C. 734 ..... 80, 108
Georgia & Florida, 192 I.C.C. 779 ..... 2, 6, 21, 32, 77, 84
Georgia & Florida, 214 I.C.C. 66 ..... 2, 47, 86

Seaboard Air Line R. v. U. S., 261 U.S. 302 ..... 41, 42, 43
Shoshone Tribe v. U. S., 299 U.S. 476 43
Southeast Oil & Gas v. U.S., 29 Fed. 2d 404 50
U. S. ex rel. Botany Worsted v. Helvering, 89 Fed. 2d 848 ..... 49, 50
U. S. v. Goltra, 312 U.S. 203 42
U. S. v. Great Falls Mfg. Co., 112 U.S. 465 21
U. S. v. Griffin, 303 U.S. 226 ... 1, 2, 7, 14, 15, 20, 24, 41, 52
U. S. v. Indian Creek Marale Co., 40 Fed. Supp. 811 46
U. S. v. New York Central, 279 U.S. 76 ..... 13, 15, 21, 41, 47, 52
U. S. v. Jones, 293 U.S. 599 49
U. S. v. Miller, 317 U.S. 369 ..... 40, 46
U. S. v. S. W. Oil & Gas, 280 U.S. 601 50
U. S. v. Thayer-West Point Hotel Co., 329 U.S. 585 43
U. S. v. 47.21 Acres of Land, 48 Fed. Supp. 73 46
Watts v. U. S., 82 Fed. 2d 266 49
Worcester Post Co. v. W. H. Parsons Co., 265 Fed. 591 74
Ylagan v. U. S., 101 Ct. Cl. 294 47

STATUTE:

Railway Mail Pay Act 4, 25, 37, 55, 60, 69

TEXTS:

9 Am. Juris. 432 39

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OPINION IN THE COURT BELOW.

The opinion of the Court of Claims (R. 12, 36) is reported at 77 Fed. Supp. 197.

Opinions in Prior Proceedings.

Previous opinion of the Supreme Court of the United States in *U. S. v. Griffin*, No. 63 October Term, 1937, is reported at 303 U. S. 226, 82 L. Ed. 764.

Opinions in prior proceedings are set out in transcript of record in the Supreme Court of the United States, No. 63, October Term, 1937, (303 U. S. 226), *United States of America* and *Interstate Commerce Commission, appellants* v. *W. V. Griffin and H. W. Purvis, Receivers for Georgia & Florida Railroad*, appeal from the District Court of the United States for the Southern District of Georgia (App. Ex. 1, R. 57) viz.:

Opinion and Order of the Interstate Commerce Commission May 10, 1933, is reported at 192 I. C. C. 779 (Trans. No. 63 (1937) 9).*

Opinion and Order of three judge United States District Court for the Augusta Division of the Southern Judicial District of Georgia, January 23, 1935 (Trans. No. 63, (1937) 57), is set out in Appendix B, p. 60, infra.

Opinion and Order of the Interstate Commerce Commission, February 4, 1936 (Trans. No. 63 (1937) 82), is reported at 214 I. C. C. 66.

Opinion and Order of the three judge United States District Court for the Augusta Division of the Southern Judicial District of Georgia February 23, 1937 (Trans. No. 63 (1937) 102), is set out in Appendix B, p. 62, infra.

JURISDICTION.

The judgment of the Court of Claims was entered April 5, 1948 (R. 30). The jurisdiction of this Court was invoked under the Act of February 13, 1925, C. 229, Section 3, 43 Stat. 939, as amended May 22, 1939, C. 140, 53 Stat. 752, 28 U. S. C. A. 288.

Petitions in both No. 135 and No. 198 were granted December 6, 1948 (R. 196).

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* Page references to Transcript in No. 63 (1937) are to the side folio numbers.

THE QUESTIONS PRESENTED.

The defendant's contentions seem to the plaintiff to pose the following basic question:

> *Did this Court err* when it upheld the contention of the petitioner, in *U. S. v. Griffin* (303 U. S. 226), that the respondent's claim presented judicial question of just compensation under the Fifth Amendment which the Court of Claims had jurisdiction to entertain and decide?

The defendant's Question 1:

> "Whether the Court of Claims has jurisdiction to increase the rates of compensation fixed by the Interstate Commerce Commission under the railway mail pay act of July 28, 1916, which provides that the Commission, after notice and hearing shall 'fix and determine' * * * the fair and reasonable rates and compensation for the transportation of such mail matter' ".

The defendant's theory seems to be that the basic question is not one *involving the determination of a judicial question of just compensation required by the Fifth Amendment, but is one for the review of legislative regulation of charges of common carriers to shippers.*

The defendant's Question 2:

> "In the event there is jurisdiction in the Court of Claims whether the scope of review permits the substitution of the Court's judgment as to what constitutes fair and reasonable rates for that of the Interstate Commerce Commission."

The question which the defendant's question poses is whether in the determination of a judicial question of just compensation required by the constitution the lower Court is bound by arbitrary conclusions of a legislative agency.

The defendant's Question 3:

> "Whether the Interstate Commerce Commission properly refused to increase the mail rates to be paid the plaintiff railroad on the ground that existing rates were fair and reasonable".

To the plaintiff it seems that this involves (1) the question as to whether or not this Court will go behind special findings of fact by the lower Court to review the evidentiary facts, and especially (2) when the defendant has failed either to move that Court for a new trial; or to assign specifications of error to any of such special findings of fact.

The defendant's Question 4:

> "Whether the requirement of the Railway Mail Pay Act that railway common carriers transport mail for 'fair and reasonable compensation', as determined by the Interstate Commerce Commission, constitutes a taking of private property for public use within the meaning of the Fifth Amendment so as to entitle petitioner to recover interest from the United States, as an element of just compensation, for the delay in payment of full compensatory rates."

The plaintiff prefers to state its own questions thus:

(1) Whether the Court of Claims should have allowed interest upon the claim for a compulsory taking of property and services under statutory authority within the meaning of the Fifth Amendment.

(2) Whether the Court of Claims should not have determined compensation under the Fifth Amendment as well as to give effect to an authorized order of the Interstate Commerce Commission as properly construed.

STATUTES INVOLVED.

The Railway Mail Pay Act of July 28, 1916, 34 Stat. 412 et seq., 39 U. S. C. A. 523 et seq. See Appendix A, p. 55, infra.

STATEMENT.

For a more comprehensive statement of the history of, and the factual details in this case, this Court is respectfully referred to the special findings of fact by the Court below. The following, however, is a summary of the more salient phases.

This case, pursued as *a remedy expressly pointed out by this Court*, is the latest phase of a long continued effort by the plaintiff to obtain relief from an abuse of administrative discretion by the Interstate Commerce Commission in arbitrarily applying a non-compensatory schedule of compensation for carrying the mails under a Procrustean rule advocated by the Post Office Department, instead of a compensatory schedule found by the Commission to be needed upon the result of a jointly agreed upon cost study in order to provide just compensation.

88.92% of the amount of the claim involved is for supplying the Post Office Department with the exclusive use of 15 feet of passenger cars fitted out at the plaintiff's cost as a railway post office, carrying mail matter therein with clerks in charge to sort and handle mail in transit (Finding 4, R. 14, and Finding 21, R. 26). At page 145 of the printed record is a picture of one of these R. P. O. apartments.

11.08% of the claim is on an authorization for the minimum 3 feet of closed pouch service, hauling and having the railroad's passenger train employees take on, put off, and care for in transit, mail pouches and parcel post packages of any quantity which, if piled six feet high (with a passage between), would occupy not more than three linear feet of a passenger car (Finding 4, R. 14, and Finding 13, R. 19).

By the railway mail pay act of 1916 (Appendix A, p. 55, infra), the service in question was made compulsory

(Finding 2) and to the Interstate Commerce Commission Congress delegated the duty of fixing schedules of pay which would yield the just and reasonable compensation required by the constitution. *U. S.* v. *New York Central*, 279 U.S. 76, 78.

On April 1, 1931, being grossly underpaid by the schedule of compensation the Commission had been applying to it,* the plaintiff, as provided for by the Act, applied to the Commission for an increase in its schedule sufficient to produce just compensation.

In the proceeding which followed the Post Office Department freely admitted (Trans. in No. 63 (1937) 143, 146, 147) that the plaintiff was underpaid, but, nevertheless insisted, for administrative convenience, that the compensation for plaintiff be held down to the same low rates previously prescribed in an earlier proceeding (144 I. C. C. 675) for lines over 100 miles in length based on the average of their costs.**

The Commission, harkening to the desire of the Post Master General not to establish a precedent by prescribing separate schedules for individual lines, disregarded the evidence, and its own finding on that evidence, that an increase of 87.4% was needed; and arbitrarily made an order that

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* Only 14½ cents per mile for the R. P. O. service, and 4½ cents per mile for the closed pouch service.

** Counsel Neiss for the Post Office Department frankly declared "I just wish to remark that in fixing the rates of pay for the transportation of mail by steam railroads in the large mail pay case, the Commission arbitrarily divided the roads into classes according to their length, and this road falls into Class 1. In fixing the rates for that class the Commission did not try to give a profit to every road, but they were obliged to use an average. It happens, unfortunately, that this road is below the average and, therefore, not making a profit." (Trans. in No. 63 (1937) p. 142.)

the same schedules theretofore prescribed in general, in another proceeding for lines over 100 miles in length, should continue to be applied to the plaintiff, viz., only 14½ cents per mile for 15 foot R. P. O. apartments, and 4½ cents for 3-foot closed pouch service. (R. 25).

For relief from the Commission's arbitrary action the claimant twice sought, by proceedings under the Urgent Deficiencies Act and after hearings, arguments and briefs, obtained from a three judge United States District Court for the Augusta Division of the Southern District of Georgia decrees for injunctions against the Commission's orders as not being in compliance with the duty on the United States to pay "fair and reasonable compensation" and as not being "just and equitable". (Finding 17, R. 24, and Finding 19, R. 19). (See Appendix B, p. 60).

The Commission and the defendant prosecuted an appeal from the said second decree and this Court held thereon that the three judge District Court did not have jurisdiction, but that there was a proper remedy through the Court of Claims (Finding 20, R. 26).

In the Court of Claims the plaintiffs introduced evidence to support their claim under both heads, viz.:

(a) that the Commission had made an error of law; (b) and that its order was confiscatory (Findings 15 to 23, R. 21 and Findings 24 to 30, R. 28). That evidence consisted largely of the same evidence which had been before the Commission, the principal feature of which was a joint cost study for an agreed upon test period, (which study was conducted upon customary and usual principles approved by the Interstate Commerce Commission)*, which the Com-

* Witness Stephenson, the expert for the Post Office Department testified: "We have nothing whatever to do with the apportionment of operating expenses between freight and passenger, be-

mission itself found to show that an increase of 87.4% would be necessary.

The lower Court made comprehensive findings of fact, which were unchallenged in that Court either by a motion for new trial or by assignments of error to any of the special findings of fact, and awarded a judgment for the plaintiff in the principal sum of $186,707.06 (R. 50); but denied interest on the ground that to do so was forbidden by Section 177 Judicial Code as amended, because they were "giving effect to an order of the Interstate Commerce Commission as properly construed", and not determining compensation in an original proceeding under the Fifth Amendment (R. 49).

The plaintiff is satisfied with the amount of the principal sum of the Court's award as being proper under either

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cause we follow the rule established by the Interstate Commerce Commission. Whether or not that is fair and equitable I do not know. We do not question the rule of the Commission. We accept it as the best basis that the Commission has been able to devise for their own purposes. I have never been able to devise any better basis; I have never tried to devise any better plan. I took the apportionments as I found them. The Post Office Department has never made any attack upon the fairness of that basis." (Trans. in No. 63 (1937) p. 168.)

* * * *

Q. (By Mr. O'Brien). As to the question which Mr. Hitt asked on cross-examination as to whether or not the Georgia & Florida representative did not express harmony with the adjustments which you had made on the space at the time of the study, upon the basis of a full year's figures was not the fact, Mr. Stephenson, that the adjustments made by the Post Office Department in that respect were satisfactory adjustments, to which they expressed no objection at all, and had no basis for it?

A. It was the most equitable basis that I could devise, and because it was, I think that the representatives of the railroad company accepted that basis". (Trans. in No. 63 (1937), pp. 169-170).

head, but it respectfully submits that on either ground (a) statutory or (b) constitutional, the issue was one for the determination of the just compensation required by the Fifth Amendment, for the taking of property under statutory authority, hence interest is necessary to make just compensation full and complete.

The judgment awarded by the Court of Claims is equivalent, for the period of this claim, to an increase in its schedule of compensation for the 15 foot R. P. O. service to only 27.17 cents per mile, instead of 14½ cents, and for the 3 foot closed pouch service of 8.43 cents per mile instead of 4½ cents.

There is no dispute about the fact that the plaintiff was underpaid, and indeed that such is the fact is now again, in effect, admitted by the defendant's argument in its brief at page 67. See page 36, infra.

In its brief the defendant employs so many highly ingenious interpretations of the facts, and arguments on the law, which are refuted and/or answered hereinafter with a fullness for which the plaintiff offers as its apology the fact that it felt compelled to do so in order to guard against the possibility that this Court might be mislead by some of the defendant's mistaken representations.

The defendant's true reason for its opposition is revealed by its contention on page 67 "that Congress did not contemplate, when it authorized general rates, that each railroad whose operating costs exceeded the average would be able to recover additional compensation based on its higher operating costs".

SUMMARY.

(A) As to the Defendant's Argument:

The defendant's contentions depend upon certain basic propositions, without which, it seems to the plaintiff, the defendant's citations are not in point and its arguments fall to the ground. Since it also seems to the plaintiff that if the defendant is shown to be mistaken on these propositions this Court needs not go further, each such proposition, as the defendant understands same, is now stated, followed by refutations thereof, as follows:

Defendant's Proposition 1:

*That neither the Court below nor this Court can consider any of the evidence on which the Interstate Commerce Commission made its reports.**

Plaintiff's refutation:

The plaintiff respectfully submits that on this proposition the defendant is mistaken because: (A) the plaintiff's Exhibit 1 before the trial Commissioner in the Court below was a full copy of the transcript of the record printed under the direction of this Court in case No. 63, October Term (1937), which set forth fully in narrative form the evidence adduced before the Interstate Commerce Commission (R. 62, 63); and (B) The defendant has overlooked the fact that this Court may take judicial notice of its own records.

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*From footnote on page 3 of the typed copy of defendant's brief furnished plaintiff but later deleted:

> "Since the evidence upon which the Commission based its findings has never been before this Court and was not before the Court below, the railroad cannot challenge their validity on the ground that they are not supported on the record."

Defendant's Proposition 2:

That the "reasons" or "circumstances" advanced by the Commission to justify its disregard of the results of the agreed upon cost study were findings of fact on the evidence, the validity of which cannot be challenged.

Plaintiff's refutation:

(A) As has already been shown the evidence before the Commission on which the Commission made its reports is before this Court by virtue of judicial notice, and was in evidence before the lower Court, hence the validity of any "reasons", "factors", or "circumstances" alleged to be a finding, or any findings allegedly made by the Commission in that proceeding in derogation of the soundness of the cost study can be, and have been, properly challenged as being unsupported by the evidence since that evidence is before this Court and was before the lower Court.

Defendant's Proposition 3:

That the defendant is entitled to challenge the special findings of fact by the lower Court.

Plaintiff's refutation:

(A) As has already been shown, the evidence upon which the Commission made its reports, together with those reports, were in evidence before the lower Court and are in evidence, and was considered and disposed of in the special findings of fact by the lower Court.

(B) The defendant filed no motion for new trial in the lower Court to question the correctness or the sufficiency of the Court's conclusions on its findings of fact, or to amend the same.

(C) The defendant failed to assign any specifications of error which specify with minuteness, or otherwise, the fact

or facts which it regarded as erroneously found or erroneously omitted to be found by the Court.

Defendant's Proposition 4:

That the evidence upon which the Interstate Commerce Commission made its reports and orders was not before this Court when it rendered its decision and report in U. S. v. Griffin, 303 U.S. 226.

Plaintiff's refutation:

(A) As has already been shown this Court did have before it in full narrative form the evidence which was before the Commission; and

(B) This Court after previously having heard argument upon the law, set a second hearing expressly for argument upon the merits, hence its decision in *U. S.* v. *Griffin, supra,* was rendered in the light of the arguments upon the merits.

Defendant's Proposition 5:

That the decision by this Court in U. S. v. *Griffin, supra, did not decide that the Court of Claims would have jurisdiction to entertain this claim on dual grounds, but was mere obiter dicta.*

Plaintiff's refutation:

(A) The lower Court expressed its opinion on this proposition as follows:

> "The defendant urges that the above-quoted statements of the Supreme Court are obiter. We do not think they are, but even so, what is said by way of obiter may nevertheless be good law."

(B) In any event, as has been shown in connection with Proposition 4 immediately preceding, this Court made its decision after second hearing for argument upon the merits, hence it was in the light of the evidentiary facts that it ruled that the Court of Claims would have jurisdiction.

Defendant's Proposition 6:

That the claim does not involve the determination of a judicial question.

Plaintiff's refutation:

(A) This proposition is in conflict with the holding of this Court in *U. S. v. New York Central*, 279 U.S. 76, 78, when it said, inter alia:

> "The question is one of construction which requires consideration not of a few words only, but of the whole act of Congress concerned. This is the Act of July 28, 1916, chap. 261, § 5, 39 Stat. at L. 412, 425-431, (U.S.C. Title 35, Chap. 15, where the long § 5 is broken up into smaller sections) which made a great change in the relations between the railroads and the government. Before that time the carriage of the mails by the railroads had been regarded as voluntary (*New York, N. H. & H. R. R. Co. v. United States*, 251 U.S. 123, 127, 64 L. ed. 182, 193, 40 Sup. Ct. Rep. 67); now the service is required (U.S.C. Title 30, =541); refusal is punished by a fine of $1,000 a day (U.S.C. Title 39, =563), and the nature of the services to be rendered is described by the statute in great detail. *Naturally, to save its constitutionality* there is coupled with the requirement to transport, a provision that the railroads shall receive reasonable compensation." (Italics supplied)

Defendant's Proposition 7:

That even though admitting that the Commission's order would leave the plaintiff underpaid it would still not be confiscatory because a similar result has been held not to be unreasonable in regulating the rates and fares of common carriers.

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* Where an average of costs is computed, it is reasonable to expect that the costs of approximately one-half the railroads will exceed the average and the remainder will fall below it. On the theory of the court below, a general order fixing rates on some such a common denominator basis would in effect fix rates for only

Plaintiff's refutation:

(A) As has already been pointed out, this Court has already held in *U. S. v. New York Central*, 279 U.S. 76, 78, and in *U. S. v. Griffin*, 303 U.S. 226, as well, that the fixing of compensation under the Mail Pay Act is one for the determination of a judicial question of just compensation, the right to which is constitutionally protected.

(B) Furthermore, in the nature of things the legislative determination of rates for common carriers is controlled by other paramount considerations not here present, particularly including the reasonableness of rate schedules as between competitive producers and markets, even though the remedying of inequality and discriminations result in some rates which do not yield sufficient compensation.

Defendant's Proposition 8:

That the compelled transportation of mail was merely the regulation of one phase of the general obligation laid by law upon all common carriers to transport everything offered by anybody.

Plaintiff's refutation:

(A) There is no such general principle of law, as common carriers can be, and often are, quite selective in the kinds of traffic which they will or will not handle. Defendant is probably confused by the rule of law that for those kinds of traffic which it holds itself out to handle a carrier must do so for all alike.

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half the railroads. Those performing better than average would be permitted to retain their better than average compensation and those performing worse than average would be permitted to recover additional compensation. It is inconceivable that the statutory provision for general rates contemplated, or any rule of law requires, this result."

Defendant's Proposition 9:

That this case is one for the review of action of an administrative agency in the regulation of the fares and charges of common carriers, over which the Court of Claims can have no jurisdiction.

Plaintiff's refutation:

(A) As has already been pointed out, this theory flies directly in the face of the decisions of this Court in *U. S.* v. *New York Central, supra*, as well as in *U. S.* v. *Griffin, supra.*

(B) As to the Plaintiff's Argument:

It is the plaintiff's position, in general, that it has no criticism to offer of the special findings of fact or the opinion, and the judgment in the amount of the principal sum of its claim; but the lower Court erred only in connection with its failure to award interest in order to make its compensation just and complete under the Fifth Amendment.

As to the facts: for a fair and neutral account of the factual side of this case the plaintiff relies greatly upon the special findings of fact by the lower Court (R. 13 to 46).

The defendant, however, portrays the facts so differently and so mistakenly that, being apprehensive that some of them might be prejudicial to its cause, the plaintiff submits a refutation thereof as its Appendix C, beginning at page 68, infra.

As to the law: the plaintiff has found some difficulty in following all the threads of the defendant's arguments in logical relation to either the defendant's enumeration of the questions which it conceives to be involved, or to its specifications of errors, but as to them the general scheme of the argument herein following is to answer the defendant's contentions on each of the specifications of error so far as it can identify the arguments of the defendant in relation to its specifications.

THE ARGUMENT.

On the Facts.

The plaintiff has no need to argue on the facts as set out in the special findings of fact by the lower Court. Therefore, the only need for factual argument by the plaintiff is that created by the defendant's manner of representing numerous facts in a light which the plaintiff does not believe to be either correct or fairly justified. To avoid burdening the main part of the brief too much the plaintiff's refutations on most of such mistaken points of fact are put into Appendix C at page 68, infra.

To illustrate the plaintiff's criticism by example, one striking instance should be pointed out here, viz., in the matter of the 30 foot fallacy:

On pages 11 and 63 of its brief the defendant represents that in the cost study there was "included in the unused space allocated to the mail service part of the excess space in a 30 ft. R. P. O. apartment which was furnished at various times when a 15 foot apartment was authorized"; and that "the elimination of this excess unused space alone which was furnished solely to serve the convenience of the carrier, might have resulted in a profit from the transportation of the mails even on the railroads theory of cost determination".

In short, this representation is simply not correct, as the following reasons demonstrate:

In the first place the sum of the plaintiff's claim was reckoned upon the basis of the results of the jointly agreed upon cost study which depended upon a joint field test for 28 days in 1931 of actual proportionate use of passenger train space by each kind of passenger train service. Obviously, therefore, the furnishing at any later time of a 30 foot R. P. O. apartment on a requisition for only 15 ft. could not possibly affect the calculation.

In the second place, the test to develop the proportions of the respective usages of space on passenger trains was conducted under the supervision of experienced representatives of the Post Office Department. It is inconceivable that any factor which might have a serious effect upon the cost study could have escaped their scrutiny, but there is not the slightest scintilla of evidence to indicate that during the said entire test period an R. P. O. apartment of 30 feet was furnished in lieu of the authorized 15 feet R. P. O. car.

In the third place the Post Office Department experts know better, having never made any such contention as that now voiced by the defendant.

In the fourth place, the only color of justification the Commission had for so making such a statement was that on the further hearing after the first injunction, witness Fulghum, for the Post Office Department, in describing an inspection trip made by him over the Georgia & Florida *some two years after the time of the test period*, testified, incidentally, that *on that occasion* a 30 ft. R. P. O. apartment had been furnished when the requisition was for only 15 ft., and, he thought, that practice was then regular. The witness attached no particular significance to that fact. When questioned, he said that, while the department preferred to have the size it ordered it entered no objection when oversize space was operated. (Trans. in No. 63, of 1937, f. 172).

In the fifth place, even if a 30 foot apartment had been furnished during the test period, it still would not have affected the accuracy of the cost study because that field study showed that there was an excess of more than 15 feet of waste space anyhow. Hence, it could make no difference if the waste space to be apportioned was inside or outside of the partition which separated the R. P. O. apartments

from the rest of the car. That this is so was demonstrated in plaintiff's Exhibit 21, both mathematically and by a graph (R. 151).

Of this fallacious contention, when urged upon the three judge District Court in the second trial, it said:

> "Further argument of the Commission, as we understood it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the post office department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed." (Appendix B, pp. 62, 66.)

Furthermore, the District Court, in that second decision, quoted with approval its findings in its first decision that "There is no attack upon the efficiency of the operation of this railroad"; "There is no charge of extravagance" (Pl. Ex. 1, p. 56); and "There is no criticism of the character of the service performed in connection with transporting the mail". (Pl. Ex. 1, p. 57).

When this same contention was pressed upon the Court of Claims it, in effect, rejected same in Finding 21 when it said only that:

> "The plaintiffs had acquired and operated some cars with a 30 ft. R.P.O. apartment, which at various times were furnished, to the Post Office Department when a 15-foot space was ordered. In such event the postal clerks used only 15 feet of the 30-foot apartment, leaving the remainder unused, and the plaintiffs were paid on the basis of the rate for a 15 foot R.P.O. apartment", R. 26).

To that finding no specification of error was assigned. The Commission's blunder may have been due to its over eagerness to exculpate itself after being put in an adversary position by the first injunction of the three judge Court, but the fact that, although it was put on full notice of this fal-

lacy in plaintiff's brief in opposition to the defendant's petition for writ, the defendant should now reiterate this error demonstrates the need for great care in entertaining its versions which add to, qualify, differ from, or depart in any way from the special findings of fact by the lower Court.

Argument on the Law.

Defendant's Specification of Error No. 1:

> *"In holding, in effect, that under the Railway Mail Pay Act of 1916, it had, in the circumstances of the present case, jurisdiction to determine fair and reasonable compensation for transporting the mails".*

When the same cause of action was before this Court in *U. S.* v. *Griffin*, 303 U. S. 226, the defendant contended, and was upheld in its position by this Court, that the issue did involve the judicial question of just compensation, hence *was not a review of legislative rate making* within the jurisdiction of a three judge district court under the Urgent Deficiencies Act. In that case when the same essential facts were before it, this Court was at pains to expressly declare that the Court of Claims did have jurisdiction if (1) an appropriate finding of reasonable compensation had been made by the Commission but an order of payment had been withheld because of an error of law, and (2) if the Commission's order was confiscatory.

(1) As to the jurisdiction under the first head: The evidence is perfectly clear that the Commission did make an appropriate finding of reasonable compensation: and it failed to give any effect whatsoever to that finding, which was an error of law. It added another error of law by capriciously picking an old schedule out of an old case, and arbitrarily imposing it on this plaintiff. This is manifest in the very phraseology of both of the Commission's orders viz.:

> "It is ordered, that the rates of pay for the transportation of mail matter established in Railway Mail

Pay, 144 I.C.C. 675, for railroads over 100 miles in length be, and they are hereby, established as fair and reasonable rates to be received by the applicant herein for services rendered on and after April 1, 1931." (Trans. in No. 63, (1937) p. 10, 51).

(2) The lower Court's jurisdiction under the Tucker Act on the ground of confiscation is equally clear. The evidence showed beyond any reasonable doubt that the rates ordered by the Commission were confiscatory. Indeed, in effect, the defendant admits it by its own specification of error No. 3.

Apparently the defendant, now reversing its former position, argues to avoid the force of the decision of this Court in *U. S. v. Griffin, supra,* now contends that this Court decided only that the three judge Court did not have jurisdiction under the Urgent Deficiencies Act because (1) the Commission's order was "negative"; and (2) there was no wide public interest in the speedy determination of the validity of mail pay orders. However, it was in that case this Court went on to say:

> "The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act do not preclude every character of judicial review. If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. *Missouri Pacific R. Co. v. United States,* 271 U. S. 603. Compare *United States v. New York Central R. Co.,* 279 U. S. 73, affirming 65 Ct. Cl. 115, 121. And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States v. Great Falls Mfg. Co.,* 112 U. S. 645; *North American Transportation & Trading Co.*

v. *United States*, 253 U. S. 330, 33; *Jacobs* v. *United States*, 290 U. S. 13, 16. Moreover, as district courts have jurisdiction of every suit at law or in equity 'arising under the postal laws,' 28 U.S.C. § 41 (6), suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Compare *Powell* v. *United States*, 300 U.S. 276, 288, 289. But a suit under the Urgent Deficiencies Act to set aside an order concerning mail pay is not primarily one against the Commission. Primarily, it is a suit against the United States. And the United States can be sued only when authority so to do has been specifically conferred.

"The Railway Mail Pay Act does not confer that authority."

As the lower Court also held in its opinion

"In *New York Central Railroad Co.* v. *United States*, 65 C. Cls. 115, affirmed on Appeal, 279 U. S. 73, which was a suit for mail pay as fixed by the Interstate Commerce Commission from the date of filing of application with that Commission for readjustment of compensation, this court took jurisdiction because the carrier was 'asserting a claim founded upon a law of Congress'. The Act of July 28, 1916, 39 Stat. 412, was involved as here. But with reference to the power and jurisdiction of the Commission this court said: Congress 'erected a tribunal or accepted one already in existence to discharge a duty which was judicial in its nature, the ascertainment of reasonable compensation to carriers for services exacted by statute,' citing *Monongahela Navigation Co.*, v. *United States*, 148 U. S. 312, 327, to the effect that when a taking has been ordered, then the question of compensation is judicial." (R. 41.)

Furthermore the petitioner's theory is squarely in conflict with what this Court expressly declared in *U. S.* v. *New York Central*, 279 U. S. 76, 78, when it said:

"Naturally, to save its constitutionality there is coupled with the requirement to transport, a provision

that the railroads shall receive reasonable compensation." (Italics supplied)

Incidentally, where at page 28 of its brief, the defendant contends that "The Railroad's action was not based on an order of the Commission", the defendant admits the Court of Claims would have jurisdiction of an action to recover compensation based upon rates fixed by the Commission which had not been paid because of an error of law. If, however, the defendant means to draw a distinction between the words "finding" and "order" in an action for a balance where the Commission has made an appropriate "*finding*" of reasonable compensation, but fails to order payment of the full amount, it is pointed out that this Court used the word "finding" and not the word "order" in *U. S.* v. *Griffin, supra.*

In any event the defendant's argument on this point rests basically upon the same erroneous concept that this is a proceeding for the review of the action of an administrative agency in its capacity as a legislative agent for the regulation of the schedules of common carrier charges for the transportation of freight and passengers.

At page 30 of its brief the defendant argues ingeniously and at length for what, in effect, is the novel proposition that the railway mail pay act is not what this Court said it was as a Post Office and Post Roads Act, but is merely a statute for the regulation of the fares and charges of railroads in their capacity as common carriers. However, there is nothing in the defendant's argument or citation of cases and legislative history in support of its contention that is in any way inconsistent with what has up to now been the view commonly prevailing and which has seemed to be the conviction of this Court that these are two separate and distinct fields of law.

If this is the carrying out of the prophesy that perhaps the defendant might make some new law in this case (R.

102) the plaintiff hardly cares to follow that lead, for it looks like the defendant is confused by the irrelevant fact that it is a common carrier. Like the bewildered express agent in Ellis Parker Butler's little classic "Pigs is Pigs", it does not seem to apprehend that there is any difference between rates for common carriers and rates of pay, rates of speed, and birth rates; and that in some aspects, some rates present legislative issues, and in others judicial question. In any event, the plaintiff respectfully submits that merely because the Congress selected the Interstate Commerce Commission as the medium for determining the basis and measure of the prices for the units at which should be reckoned the amounts necessary to pay just compensation for the taking of property by the Government, and the term employed to designate such prices is the word "rates"; and that those from whom the use of property are taken are common carriers, in no way changes the fact that the use of the property and service was compelled under statutory authority subject to a constitutional duty to pay just compensation.

On page (37) under the heading, "THE COURT OF CLAIMS HAS NO POWER TO FIX RATES UNDER THE RAILWAY MAIL PAY ACT OR TO ORDER REVISIONS OF THE COMMISSION'S RATE ORDERS", the defendant proceeds with the elaboration of its argument that the Court of Claims lacks jurisdiction to entertain this claim, (notwithstanding the opinion of this Court in *U. S.* v. *Griffin*, 303 U.S. 226.) It does not seem to the plaintiff that this extention of the defendant's argument, along with the cases cited, are in point because of the lack of any foundation for the proposition that this claim is not one for just compensation within the protection of the constitution. Here, as the lower Court well said:

> "The duty of the Commission extended beyond that of establishing rates. The statute went further and required the Commission to fix fair and reasonable compensation to the individual carrier. It had to be

> the *individual* carrier, for otherwise the term "compensation" is meaningless. Only in the event that they were "just and equitable" could the Commission 'fix general rates applicable to all carriers in the same classification'. 39 Stat. 412, 430. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier, in the same class, a deficit." (R. 48).

At page (42) the defendant under the heading of "THE JURISDICTION OF THE COURT OF CLAIMS CANNOT BE PREDICATED ON A THEORY OF EMINENT DOMAIN", displays great diligence in its review of early cases, beginning at a time when rate cases were considered to be governed by principles applicable to the law of eminent domain, and down to a later time when that view became reversed, but to the plaintiff it seems irrelevant and immaterial unless some new law is made. Incidentally, however, the defendant makes the statement in the course of its argument, that the Court of Claims was clearly correct in holding that the determination of reasonable rates for transporting mail did not involve a taking of private property for public use; but it failed to cite any page or pages in the record upon which it relied as its authority for that statement.

While the lower Court did say, in making its award, it was "giving effect to an order of the Interest Commerce Commission, as properly construed, and not determining compensation in an original proceeding under the Fifth Amendment", but in no place in its opinion did it hold that as a matter of fact and law there was no taking of property for public use. To the contrary, at page 33, it stated that "this was not the first case in which dual or alternate grounds for jurisdiction were considered", and quoted what this Court had itself said in *New York Central R. Co.* v. *U. S.*, 65 Ct. Cl. 115, with reference to the power and jurisdiction of the Commission, that "Congress 'erected a tribunal or accepted one already in existence to discharge a

duty *which was judicial in its nature*, * * *". Citing *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 327, to the effect that *when a taking has been ordered, then the question of compensation is judicial.* (Italics supplied.) (R. 42) And the lower Court further said:

> "A deficit in net railway operating income from the carrying of the mail is, on its fact, confiscatory. That must be conceded. It is a simple proposition that needs no support and must be accepted as obvious." (R. 42.)

* * * *

And also that Court said:

> "* * * the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid $186,707.06 in fair and reasonable compensation for the period in question. See Finding No. 23 (R. 48).

* * * *

> "* * * The reasons given by the Commission for not ordering payment, on the basis of its findings, of the annual sums making up the above total of $186,707.06, are not convincing or even persuasive. In our opinion they all overlook the statutory mandate that the compensation to be allowed for carrying the mails must be reasonable, *and the constitutional one that it must be just.*" (Italics supplied) (R. 48).

Furthermore, the lower Court expressly pointed out that:

> "The carrier had no choice in the matter. That which protected the carrier was the provision for "fair and reasonable compensation", and, of course, the Fifth Amendment" (R. 37).

It is respectfully submitted that even though the lower Court did purport to rest its award upon the statute, that statute simply implemented the constitutional duty to pay just compensation.

Defendant's Specification of Error No. 2:

"In holding that on the facts as found and stated by the Interstate Commerce Commission, there is an erroneous conclusion of law by the Commission that the railroad has been fairly and reasonably compensated for their mail service."

In the first place the lower Court did not summarily reject the Commission's so-called "factors" or "circumstances" but weighed them and found them wholly wanting in merit. That it did do so is proven by the lower Court's full and comprehensive special findings of fact; and also in its opinions, as the following quotations therefrom show beyond any doubt:

> "The deficit found in plaintiffs' mail operations was ascertained according to the formula suggested by the Government and used by the Commission to prescribe rates for general application. As we have pointed out, the ascertainment of fair and reasonable compensation must proceed from a fair and reasonable basis. The Commission has, by its use of Plan No. 2, adjudged it to be a fair and reasonable basis. And out of that basis there has been ascertained, by formulae prescribed by the Commission, what is the fair and reasonable compensation for plaintiff's carriage of the mails beginning the first of April 1931, and ending at the close of February 1938. Fair and reasonable compensation cannot be both a deficit and the amount of $186,707.06 so found. It is, we conclude, the latter." (R. 46)

> "The Commission's decision of May 10, 1933, 192 I. C. C. 779, states its position with reference to plaintiff's claim as follows:

> 'The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See *Railway Mail Pay, supra.* The comparison of mail revenue with other revenue received for services in passenger-train operations shows that mail with relation to the other

services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished. Applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads are, as applicant points out, roads which are very much larger and which have greater traffic and lower unit operating costs. On the other hand, many are in much the same situation as the applicant in respect of passenger-train operations. The data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like service."

"We quote rather than paraphrase this, for what it says is important. We are of the opinion that the "approximation" should be given greater weight than the Commission affords it, because, as we have said, and the Commission in effect admits, there is no such thing as certainty in actual cost. Approximate, or as it is called, "Computed" cost must be relied upon, and as a matter of law must be decisive. Of course, there were other methods of computing cost, but the Commission, put to the choice, selected Plan No. 2. And it did not, in the decision of May 10, 1933, abandon Plan No. 2 and select another."

The fact that the plaintiffs' railroad "receives the same rates as those received by other roads for the same kind of service", is not responsive to the plea that those rates, as to the plaintiffs, are confiscatory. The service is compulsory, economy and efficiency of operation are undisputed. This is not a case where the carrier may cut down its expenses and thus convert the remuneration into one that is fair and reasonable. It has already reached the efficient and economical stage, and if it must carry the mail, the remuneration must fit that situation. Here is has not done so." (R. 46-47).

. . . . . .

"The rates authorized by the Commission were based on a grouping together and then given particular application without change. It did not follow that rates, fair and reasonable for an average road (which

in fact did not exist), would be fair and reasonable for all existing roads. The statute required more than mere rates, it required fair and reasonable compensation and the duty of fixing upon and authorizing payment of fair and reasonable compensation in any particular case could not be avoided because of the magnitude of the task, or because some other methods of calculation, which, although neither approved nor adopted, might possibly give other results.

There is no presumption that the average is true of the particular. The presumption is otherwise, and the plaintiffs, having shown their railroad to be in a comparatively low scale, and thus distant from the average, had no great burden of proof before them in presenting their case to the Commission. It was for the Commission to demonstrate that the general rates prescribed gave the plaintiffs a fair and reasonable return. This the Commission failed to do. More than that, the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid $186,707.06 in fair and reasonable compensation for the period in question. See Finding No. 23. (R. 48)

If that which the Commission determined is fair and reasonable compensation for the representative road, it must, we think, be fair and reasonable for any one road that is so represented. The reasons given by the Commission for not ordering payment, on the basis of its findings, of the annual sums making up the above total of $186,707.06, are not convincing or even persuasive. In our opinion they all overlook the statutory mandate that the compensation to be allowed for carrying the mails must be reasonable, and the constitutional one that it must be just." (R. 48).

Furthermore, the four judges on the lower Court were not alone in their dim view of the "reasons" or "circumstances" given by the Commission by way of attempting to exculpate itself for its arbitrary action. What the three judges on the District Court said, and appears in full in Appendix B, pp. 60, 61, 66; infra.

In the second place, the cases cited by the defendant are not in point for the same reason, already hereinbefore given, i. e. that the defendant has gone astray upon the mistaken predicate that this case was not for the determination of the judicial question of just compensation under the constitution, but, instead, was one for the review of an act of legislative rate making.

Defendant's Specification of Error No. 3:

> *"In holding that the mail rate fixed by the Interstate Commerce Commission was confiscatory and did not fairly and reasonably compensate the railroad."*

In support of its specification 3 the defendant, beginning at page 59, asserts that the Court below erred in holding (1) that fair and reasonable rates must be determined by application of a particular formula which compelled compensation for abnormal amounts of space not devoted to the transportation of the mail; and (2) that the "factors" relied upon by the Commission to disregard the results of the cost study were intrinsically sound.

The plaintiff replies that neither of these propositions is correct. No. 1 has already been refuted at page 27, supra, and likewise, No. 2 has been dealt with at pages 17 and 68, supra, to which reference is made to save repetition.

On page 59 the defendant, continuing its argument, asserts that the lower Court "erroneously assumes or asserts that the Commission had adopted Plan 2 as the proper method of determining cost and investment", but the respondent respectfully submits that the lower Court made no such error. Its findings, and its opinion, show that it clearly understood the nature of Plan 2 as a part of the cost study; and also that they knew full well that the Commission had rejected *the result* of the cost study; as well as the reasons why the Commission did so. This is evident in the very careful and comprehensive special findings of

fact, and in the following further quotation from the Court's opinion:

> "Railroad expenses are not generally applicable as direct costs but require apportionments. The Commission did not, under Plan 2, which it adopted and which we must accept, determine actual costs of various operations. For the year 1931 the total operating costs of plaintiffs' road were found to be $1,449,801. Of this sum 21.74%, or $315,273, was determined to be apportioned to passenger train service in which the mail traffic was served. Based upon the space used or hired, the Commission determined total expenditures applicable to the mail service of $40,673. As against these expenditures, the plaintiffs' road had a deficit in this test period of $4,945, which indicates that its gross mail revenues were $35,728. In other words, the mail revenues were $4,945 less than the operating expenditures applicable to the mail service, which resulted in such deficit." (R. 44).

Continuing, on page 59 the defendant asserts that, in its first report in 1933 on the request for re-examination of the mail rates paid the railroad, the Commission pointed out that the cost formula which it had used in originally fixing rates was not "an accurate ascertainment of the actual cost of service", but was merely "an approximation to be given such weight as seems proper in view of all the circumstances".

The respondent again respectfully submits that the special findings of fact well show that the lower Court fully and correctly understood the nature of the cost study. The court discussed this proposition very clearly, and in its opinion, among other things, said:

> "A deficit in net railway operating income from the carrying of the mail is, on its face, confiscatory. That must be conceded. It is a simple proposition that needs no support and must be accepted as obvious. But, if we correctly read the decision of the Commission in

the plaintiffs' case, reported in 192 I.C.C. 779, supra, the Commission's position is that the deficit of $4,945 is a 'computed' deficit, not necessarily an actual deficit, and therefore not to be taken as 'confiscatory', although the Commission does not use that term.

The trouble with this argument is that a deficit in net railway operating income from mail is always necessarily 'computed'. Actual loss or actual deficit in such income is an ignis fatuus. This must be so until the method of arriving at a deficit receives authoritative if not common acceptation. The Post Master General himself proposed three alternative plans, which itself indicates lack of an absolute rule. (R. 42).

* * * * *

"We thus see that ascertainment of 'actual' as applied to plaintiffs' cost in the transportation of the mail, had no prospect of realization. The cost had to be a 'Computed' cost in any event. But had we the actual cost it would serve only as a guide, a cost to be considered, but not necessarily to govern, in arriving at fair and reasonable compensation. The question is, rather: What is the fair and reasonable cost? For we cannot proceed from an unfair and an unreasonable cost toward a fair and reasonable compensation.

Here, however, it is found that 'there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area, or that such costs were increased by inefficiency, negligence, or uneconomical management of operation by the plaintiffs.'

Nowhere in the Commission's findings or conclusions in plaintiffs' case do we find even an intimation that the so-called 'actual' cost, whatever it might be, was anything but fair and reasonable." (R. 43).

Continuing, on page 60, the defendant asserts that it was "crystal clear" that the Commission had rejected Plan 2 when it gave controlling consideration to other factors than the results of the cost study. Petitioner is mistaken, as Plan 2 has never been rejected, but, to the

contrary, has been relied upon fully by the Commission in finding the results of cost studies in every mail pay case, including the present. (Finding 8, R. 16).

What the defendant probably had in mind was that the Commission rejected the *results* of the cost study, of which Plan 2 was an integral part. If so, *that argument is equivalent to an admission that the Commission disregarded the evidence*, for that cost study was, in the main, *the evidence relied upon by both sides.*

What the Commission itself said was:

> "* * * The method is described in Railway Mail Pay, supra. In this plan, referred to here and in the prior proceeding as Plan 2, car-miles and car-foot miles of operation in cars employed exclusively for one service are referred to as full cars, whether loaded or not, and the entire operation of each is allocated to the service to which it is assigned." The space in combination and mixed cars is allocated to each service, according to the space used, except that space authorized for mail is regarded as space used. The unused space in such cars is apportioned in proportion to the space used. * * *
>
> The car-foot miles of service in the test period of 28 days was equivalent to 82.78 per cent of the car-foot miles for a 28-day period computed from the total car-foot miles actually operated throughout the year 1931. The department therefore adjusted the space data to reflect the actual operation for the year. This resulted in a space ratio for mail under Plan 2 of 12.96 instead of 15.03. The ratio for passengers, including baggage and miscellaneous, is 80.35 and for express 6.69. The applicant while criticizing the adjustment does not contest it." (192 I.C.C. 779, 781).

The Commission then went on to find that, *using Plan 2*, the joint cost study extended to the year 1931 as adjusted, showed that the computed deficit in net railway operating income from mail was $4,945; and at a rate of 5.75% the

return on the investment in road and equipment allocated and apportioned to mail would amount to $26,282, and to meet these combined amounts would require an increase in compensation of 87.40%. (192 I.C.C. 779).

Continuing at page 60 defendant asserts that in other mail pay cases the Commission has given "consideration" to other "factors" besides the cost study. The generally worthless character of the other "factors" claimed to have been "considered" has already hereinbefore been pretty generally exposed at pages 17 and 68 et seq., to which reference is made to save repetition.

The plaintiff would have no quarrel with the proposition that it is relevant to take into consideration any material factors which may be a matter of proper evidentiary record, or of which judicial notice may properly be taken, along with the cost of the service, but does respectfully submit that the correct rule of law was well stated in the opinion of the three judge Court, February 23, 1937 when they said:

> "What elements may have been persuasive 'In other mail proceedings' are not necessarily to be considered here, and should not be in the absence of supporting testimony and some indication as to what weight was given each element." (Appendix B, p. 65).

At page 62 the defendant cites the recent case of *Ayrshire Collieries Corp.* v. *United States*, No. 25 this Term, Decided January 3, 1949, as authority for the proposition that "it is no longer open to dispute that in the determination of a *fair and reasonable rate* it is appropriate to consider other factors than the cost of providing the service and the rate of return on the investment employed in providing the service." (Italics supplied).

The plaintiff has no quarrel with the principles on which the Ayrshire Collieries Corp. case was decided, but it is not

applicable here. In other words, the defendant has admitted that the plaintiff was underpaid, but attempts to justify that denial of just compensation on the authority of the Ayrshire decision, but the difficulty with that argument and that citation is as elsewhere, that it is not in point because here it is not a rate case of that kind. The Ayrshire case is just another illustration of the cogency of some of the reasons why the fixing of rates to be charged by common carriers should and must be determined on other principles than those which govern the determination of just compensation. As the Ayrshire case makes clear, the issues in a rate case ordinarily have little relation to whether or not the rates to be paid by shippers will produce just compensation, but turn more upon questions of discrimination and comparative reasonableness, as affected by competition between rival commodities, rival shippers, rival markets, and rival carriers. There cost studies are mainly useful as a guide to the limitation of rates to a general level which, though not compensatory in themselves, will not fall below bare "out-of-pocket" costs.

In any event, what a Commission may or may not do, in any ordinary rate case is quite immaterial here, because this is a case where the right to just compensation is protected by the Fifth Amendment.

On pages 63, 64, 65, 66 and 67 the defendant again represents many of the "reasons" or "circumstances" or "factors" advanced by the Commission to justify its arbitrary disregard of the cost study as though they were findings supported by evidence, when such is not the case, as is amply demonstrated in Appendix C hereto (p. 68, infra).

If the defendant had any real confidence in the correctness, relevance, materiality and weight of these "factors", it was derelict either in its duty in failing to put it in evidence to support same, or if it was in evidence, to move

the lower Court for a new trial. If it believed that the evidence would support any of its present versions it should have assigned a specification of error either of commission or omission to each instance in which it claims the special findings of fact are contrary to the evidence. The defendant seems to be under the impression that the evidence before the Commission is not before this Court, and was not before the lower Court, so that it had a free hand in portraying the Commission's conclusions as though they were findings supported by evidence. Indeed it practically said as much in a footnote on page 64 of the printer's proof of its brief: "Since the evidence upon which the Commission based its findings has never been before this Court and was not before the court below, the railroad cannot challenge their validity on the ground that they are not supported on the record."

The defendant evidently concluded that this admission was too significant, or possibly it discovered after all that the evidence was before this Court in case No. 63, October Term (1937) in the form of a full narrative transcript prepared by itself, and that plaintiff's Exhibit 1 in the Court below was a copy of this Court's print of that same transcript (R. 57).

The underlying concept upon which the defendant's contentions are founded is expressed at page 67 of its brief, thus:

> "Where an average of costs is computed, it is reasonable to expect that the costs of approximately one-half the railroads will exceed the average and the remainder will fall below it. On the theory of the court below, a general order fixing rates on some such a common denominator basis would in effect fix rates for only half the railroads. Those performing better than average would be permitted to retain their better than average compensation and those performing worse than average would be permitted to recover additional

compensation. It is inconceivable that the statutory provision for general rates contemplated, or any rule of law requires, this result." (See *Boules v. Williamson*, 321 U. S. 503, 518; New England Division Cases, 261 U. S. 184).

The plaintiff respectfully submits that the defendant is greatly mistaken in this concept for it is not only manifestly a denial of equal justice under the law, but flies in the face of the prohibitions of the Fifth Amendment, and, contrary to the defendant's contention, it flouts the will of Congress. It is simply not true that Congress did not contemplate, when it authorized general rates, that any railroad whose operating results exceeded the average would be *compelled* to perform service at less than cost. To the contrary, Congress expressly provided for remedying any such situation by the following clause in the Railway Mail Pay Act:

> "Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein. (28 U. S. C. 553)." (Appendix A, pp. 55, 59, infra.)

To repeat it was on this point that the Court of Claims well said:

> "The duty of the Commission extended beyond that of establishing *rates*. The statute went further and required the Commission to fix fair and reasonable *compensation* to the individual carrier. It had to be the *individual* carrier, for otherwise the term "compensation" is meaningless. Only in the event that they were "just and equitable", could the Commission "fix general rates applicable to all carriers in the same classification." 39 Stat. 412, 439. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier, in the same class, a deficit." (R. 48)

The Defendant's Specification of Error No. 4:

> *"In failing to hold that since the mail traffic bore, in addition to its direct costs, a fair share of the expense of operation and contributed relatively more than the other services for the space furnished, the mail compensation fixed by the Commission was fair and reasonable."*

Since the defendant has by implication admitted by force of its own argument at pages 10, 67 of its brief, that the plaintiff was underpaid, the defendant's argument in support of its specification No. 4 is largely (1) a repetition of its mistaken "theme song" that this is only a matter of legislative rate making, hence that non-compensatory compensation is just and reasonable; and (2) a repetition of its contention that the "reasons" or "circumstances" advanced by the Commission were sufficient to justify its failure to apply the results of its own findings. These concepts already have been sufficiently answered by plaintiffs preceding arguments, to which reference is made to save repetition (pp. 56, 79). Furthermore, in the face of the realities such a line of argument hardly requires any discussion when about 90% of the plaintiff's claim is for furnishing and transporting 15-foot post offices on its trains carrying mail matter and postal clerks at a compensatory rate of 27.17 cents per mile, instead of a non-compensatory rate of 14½ cents per mile.

The Defendant's Specification of Error No. 5:

> *"In failing to hold that the statutory requirement that the railroad carry all mail tendered is merely one phase of the general obligation imposed on common carriers to transport all traffic whether tendered by the Government or a private person."*

The defendant's contention seems to be that there is a *general obligation* imposed on common carriers to transport *all traffic* whether tendered by the Government or a private person, but it is only elementary law that there is

no such thing as "a general obligation" imposed on common carriers to transport all traffic offered.* To the Contrary, they can be, and many are, quite selective of the kinds of traffic which they will handle.

Perhaps the explanation for this specification 5 is that the defendant was thinking of the rule of law that to the extent to which a common carrier holds itself out to serve the public it must do so for all alike.

The Defendant's Specification of Error No. 6:

> *"In failing to hold that the railroad actively sought to retain the mail traffic here involved, and that reasonably similar service could be obtained by the use of other railroads and trucks without increasing costs."*

The defendant makes little attempt to support this specification in its argument, but in any event this point is disposed of sufficiently in Appendix C, pp. 68, 86, to which reference is made to save repetition.

The defendant's argument that "The decision of the Court of Claims is not sustained by traditional judicial standards of 'just compensation'," apparently contends that unless the plaintiff's claim can be measured by a yardstick of *market value* it can recover no compensation even though it is justly entitled to do so.

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* "Every common carrier has the right to determine what particular line of business he will follow, and his obligation to carry is coextensive with, and limited by, his holding out or profession as to the subjects of carriage. If he elects to carry freight only, he will be under no obligation to carry passengers, and vice versa. Similarly, if he holds himself out as a carrier of a particular kind of freight generally, prepared for carriage in a particular way, he will be bound to carry only to the extent and in the manner proposed." (Carriers: 9 Am. Jur. 432).

The plaintiff respectfully submits that the cases cited are not in point because the reach of the Fifth Amendment is not so limited as the defendant's concept thereof.

It is hardly necessary to labor the refutation of the defendant's contention, as the principle is too elementary to justify it. It ought to be enough to quote what this Court said without dissent, speaking through Justice Roberts in *U. S. v. Miller*, as late as January 4, 1943, 317 U. S. 369, 373:

> "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the 'value', the 'market value', and the 'fair market value', of what is taken. The term 'fair' hardly adds anything to the phrase 'market value', which denotes what 'it fairly may be believed that a purchaser in fair market conditions have given', or, more concisely, 'market value fairly determined'.
>
> * * * * * * * * *
>
> "Where, for any reason, property has no market, resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety."

Other cases to which the opinion made reference were *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328, 329, 337, 338; and *Albert Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 589.

THE PLAINTIFF'S SPECIFICATIONS OF ERROR

Interest on the Judgment

Plaintiff's Specification of Error No. 1: In failing to award interest to make just compensation full and complete since the claim was for the compulsory taking of property and services (U. S. v. Griffin, 303 U. S. 226, 82 L. Ed. 764).

The plaintiff respectfully submits that this Court has already decided that the requisitioning of mail transportation under the Railway Mail Pay Act is a taking for which just compensation is a constitutional right. In construing this Act, this Court said in *U. S. v. New York Central R. Co.*, 279 U. S. 77, 78, 73 L. Ed. 619, that "the Government admits, *as it must*, that a reasonable compensation for such required services is a constitutional right" (Italics Supplied). Again, in *U. S. v. Griffin*, 303 U. S. 226, 238, 82 L. Ed. 764, when this same cause of action between the same parties was before it, this Court reiterated the proposition that railway mail service is compulsory.

The plaintiff further respectfully submits that for a compulsory taking by statutory authority the requirement of the Constitution that "just compensation" shall be paid is comprehensive, and one of the essential elements of just compensation is that of interest when the taking precedes the payment; hence the rule that the United States will not be held liable for interest on unpaid accounts and claims does not apply. This Court said as much in the case of *Seaboard Air Line v. United States*, 261 U. S. 302, 405, 67 L. Ed. 664, 670, viz.:

> "*The Constitution safeguards the right and § 10 of the Lever Act directs payment* (Italics supplied). The rule above referred to that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that "Just compensation" shall be paid is comprehensive,

and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."

It is true that in the *Seaboard Air Line* case, the property involved was in the form of land, but it was not a case of condemnation. In that instance there, as here, there were statutory provisions for payment, in which nothing was said about interest, and the Court further said:

> "Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in repect of interest. *Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute.* Its ascertainment is a judicial function. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 327, 37 L. Ed. 463, 468, 13 Sup. Ct. Rep. 622" (Italics supplied).

More recently in *U. S.* v. *Goltra*, 312 U. S. 203, 208, 85 L. Ed. 776, 781, this Court explained the principle further when it said:

> "In the *Seaboard Air Line R. Co.*, case § 10 of the Lever Act (August 10, 1917) (40 Stat. at L. 276, 279, chap. 53) authorizing the taking by eminent domain of property for the public use on payment of just compensation was under examination. It contains no specific provision for interest. This Court held that a taking under the authority of § 10 required the just compensation "provided for by the Constitution" and that such compensation is payable "as of the time when the owners were deprived of their property". This case, however, and the others cited in the preceding paragraph, involve the requisitioning or taking of property by eminent domain under authority of legislation. *The distinction between property taken under authorization of Congress and property appropriated without such authority has long been recognized*" (Italics supplied).

The Constitution sets up no rule for discrimination between real property and property of other kinds *where*

property is taken under authority of a statute; and it has many times been held by the Supreme Court of the United States that where the payment does not accompany the taking, but is postponed to a later date, the property owner is entitled to the award of a reasonable additional sums as interest or damages, to compensate for the loss of the money, as well as the property, during the period of delayed payment (See *Kieselbach* v. *Commission*, 317 U. S. 399, 403 405 (1943); *Klamath Indians* v. *U. S.*, 304 U. S. 119, 123 (1938); *Shoshone Tribe* v. *U. S.*, 299 U. S. 476, 496 (1937); *Liggett & Myers* v. *U. S.*, 274 U. S. 215 (1927); and cases cited in those opinions. The defendant's position is that:

> (1) Admittedly, if there had been a taking of property in the eminent domain sense, the prohibition against the allowance of interest on claims prior to judgment would not apply. *Jacobs* v. *United States*, 290 U. S. 13; *Seaboard Air Line* v. *United States*, 261 U. S. 302.
>
> (2) That the Court of Claims had correctly held that (a) that it was not determining just compensation and denied the claim for interest.
>
> (3) That the Court of Claims was clearly correct in its decision that there was no eminent domain taking; and, it follows, therefore, that the railroad may not recover interest. See, e.g. *United States* v. *Thayer-West Point Hotel Co.*, 329 U. S. 585.

The defendant's position on point (1) involves no controversy. For support of points (2) and (3) the defendant seems to rely wholly upon its mistaken impression that the lower Court decided that "there was no eminent domain taking".

In the first place, the fact that the defendants were apparently under the misconception that the protection of the Fifth Amendment applies only to cases of takings by right of eminent domain.

In the second place, it is respectfully submitted that the lower Court did not decide there was no "eminent domain" taking. On the other hand it held that as a matter of fact and of law that there was a taking for which just compensation was required under the Fifth Amendment, although it did not put its award upon that ground. This is mentioned several times in the decision such as in the following quotation:

> "under these, and other *statuory conditions*, the plaintiffs transported mail tendered by the United States. The tender could not be refused except under heavy penalty, and the terms used in the record to describe such a statutory tender, such as 'order' or 'authorization' have essentially one meaning which derives its scope, definition and force from the statutory requirements that compelled obedience. The carrier had no choice in the matter. That which protected the carrier was the provision for 'fair and reasonable compensation', *and, of course, the Fifth Amendment.*" (R. 36.)

Plaintiff's Specification of Error No. 2: In failing to hold that it was determining a claim for just compensation required by the Constitution, whether it was (a) giving effect to an order of the Interstate Commerce Commission as properly construed, or was (b) determining just compensation because the order of the Commission was confiscatory.

Plaintiff's Specification No. 2 is supplementary to its Specification No. 1. The fact of the taking is not only established by the lower Court's special findings of fact, but in the course of its opinion it seems evident that it was in no doubt but that, as a matter of law, the taking was one for which just compensation was required by the Constitution (R. 36, 37).

The record shows that proof of claim was made both upon (1) statutory grounds and (2) constitutional grounds

(R. 20). The proof made on the theory of compensation on statutory grounds established the amount of the claim at $186,707.06 (Finding 23, R. 27). That evidence was also relevant to the theory of compensation upon constitutional grounds but was supplemented by an additional study in which the amount resulting was $179,005.64 (Finding 30, R. 36).

After weighing all the evidence and hearing all the arguments, the lower Court was convinced that the basis on which the Commission made its finding on the result of the cost study was fair and reasonable, as the "studies made are in no wise shown to be out of line with the then state of the art, science, or profession of statistical analyses and cost accounting" (R. 46); and a little further on said:

"More than that, the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid $186,707.06 in fair and reasonable compensation for the period in question" (See Finding 23).

* * * * *

"The reasons given by the Commission for not ordering payment, on the basis of its findings, of the annual sums making up the above total of $186,707.06, and not convincing or even persuasive. In our opinion they all overlook the statutory mandate, that the compensation to be allowed for carrying the mails must be reasonable, and the *constitutional one* that it must be just" (R. 48).

Never-theless, the Court evidently felt that the intention of the statute was so clear that, had it been properly carried out, the constitutional requirement for just compensation also would have been met, hence to make an award on the statutory ground would make it unnecessary to do so on constitutional ground.

In other words, the fact that because the Commission's order, properly construed and applied, would have met the statutory requirement does not make any less binding the constitutional duty to pay just compensation; and it is well established that the constitutional requirement guarantees the right of the person whose property is taken, not only to compensation according to the value of the property at the time of taking (see also *U. S.* v. *Miller*, 317 U. S. 369 (1943) but also the payment of the compensation with reasonable promptness. The promptness of the payment is included with the right, for the reason that it is an element of the justness of the compensation. This right is not dependent on either the statute or agreement and any condemnation statute not providing for certain and reasonably prompt compensation, or its equivalent, to the owner of the property taken violates the Federal Constitution. See, for example: *Danforth* v. *U. S.*, 308 U. S. 271, 283-286 (1939); *Atlantic Coast Line R. Co.* v. *U. S.*, 132 Fed. 2d 959, 962-963 (1943); *U. S.* v. *47.21 Acres of Land*, 48 Fed. Supp. 73 (1943); *U. S.* v. *Indian Creek Marble Co.*, 40 F. Supp. 811, 181-820 (1941).

It must have been with this principle that Justice Holmes quoted from *Parks* v. *Boston*, 15 Pick. 198, 208, where Chief Justice Shaw said that:

> "The true rule of justice for the public would be to pay the compensation with the one hand, whilst they apply the axe with the other."

ON THE STATUTE OF LIMITATIONS

At page 84 of its brief the defendant argues that the statute of limitations bars the major part of this claim. This argument rests upon the theory that the cause of action first accrued at the date of the order of a Division of the Commission on May 10, 1933, and not from the decision of the Commission as a whole on February 4, 1936. The same contention was raised in the Court of Claims and rejected by that Court in the following language:

"There is the question as to the statute of limitations, Section 156 of the Judicial Code, U. S. C., Title 28, § 262. Under that statute, a claim is barred unless the petition is filed 'within six years after the claim first accrues.' The time when the claim can be definitely ascertained and set up governs. *Flagan* v. *United States*, 101 C. Cls. 294, 296.

"Since the determination of fair and reasonable compensation was confided by Congress to the Interstate Commerce Commission, the amount of the claim was not ascertainable until the Commission had given its final determination. This date was February 4, 1936; 214 I. C. C. 66. It is true that the Commission reopened its docket No. 9200 under the decree of a district court, which was thereafter held by the Supreme Court to be without jurisdiction over the complaint, but the Commission did in fact reopen the case, considered it on the merits, and did in fact thereupon render its final decision in the matter, affirming its previous holding.

"The six-year statute of limitation therefore began to run February 4, 1936. Since the original petition was filed herein February 2, 1942, the claim is within the statute. That the claim relates back to the filing of the application with the Commission has been held by the Commission, by this Court, and by the Supreme Court, *Railway Mail Pay*, 144 I. C. C. 675, 717, and *New York Central Railroad Co.* v. *United States*, 65 C. Cls. 115, 124 ff, a decision which antedated that of the Commission, and which was affirmed by the Supreme Court, 279 U. S. 73."

The Government in its brief cites no authority in support of its assertion that plaintiff's cause of action accrued on May 10, 1933, and not when the Commission rendered its decision on February 4, 1936, following a formal reopening by the Commission of the proceeding, and after further hearings at which additional evidence was adduced and the petition reconsidered. There can be no doubt of the general rule that an administrative agency, such as the Interstate Commerce Commission, can reopen a proceeding for reconsideration. No contention is made

that the Interstate Commerce Commission was without such power and authority. Indeed it must do so under some circumstances. See *Atchison, Topeka & Santa Fe Railway Company* v. *U. S.*, 284 U. S. 248, 76 L. ed. 273.

There appears to be no decision of a court determining when a cause of action accrues against the United States in a mail pay case, whether at the time of the decision by a division or by Interstate Commerce Commission, in such a proceeding, or at the later time of a decision following a reopening and a reconsideration. There have, however, been numerous cases involving the effect of a reconsideration of a refund claim in tax matters by the Commissioner of Internal Revenue, where the analogy is so close that those decisions would seem to be governing on this question.

The case of *American Safety Razor Corp.* v. *U. S.*, 6 F. Supp. 293, decided by the Court of Claims on March 5, 1934, involved this very question. A claim for a refund was denied by the Commissioner of Internal Revenue followed by a series of communications with reference to further consideration of the claim. The court determined that the particular claim involved was, in effect, reopened and reconsidered by the Commissioner, followed by its rejection. Suit was filed within two years from the final rejection, but not within two years of the first rejection, and the Government argued that the suit should have been filed within two years of the first rejection.

In support of its contention, the Government pointed to a Treasury Decision stating that no reopening of a claim for refund and no reconsideration of such claim could extend the period within which suit should be brought. The Court of Claims decided that the Treasury Decision was erroneous and that "the effect of reconsideration was to set aside the former decision and bring up the matter as if it had not before been acted upon." In deciding that the statute of limitations ran from the final decision upon reopening of the case and not from the first decision, the

Court cited the decision of the United States Circuit Court of Appeals for the Second Circuit in *McKesson & Robbins v. Edwards*, 57 F. (2d) 147, and other court decisions stating:

> "In *Jones v. United States*, 77 Ct. Cl. ....., 5 F. Supp. 146, 152, we said: 'That a reconsideration of a refund claim on the merits constitutes a reopening of the claim is no longer open to doubt.'
>
> "This case also affirms the rule that, " " " when the Commissioner, upon application made by a taxpayer within the time in which suit could be instituted on a disallowed claim, enters into a reconsideration of the merits of the claim and later makes a decision thereon rejecting the claim, or adheres to his former decision rejecting it, his decision for the purpose of the statute of limitations is in abeyance until he has reached and announced his final decision, and the taxpayer, under section 3226 of the Revised Statutes, as amended (26 USCA § 156), has two years thereafter in which to institute suit."

The Supreme Court of the United States refused to grant certiorari to review this decision, 293 U. S. 599.

The decision of the Court of Claims and the refusal to grant certiorari to review that decision were cited by the United States Circuit Court of Appeals for the Second Circuit in *Watts v. U. S.*, 82 F. (2d) 266, for the rule that a suit brought within two years after the final action in the reconsideration of a decision upon a refund claim was timely. The Court rejected a contention that the statute of limitations ran from the first determination of a claim for refund and held that following a reopening of the case by the Commissioner of Internal Revenue the statute of limitations began to run all over again at the time of the second decision.

There have been numerous other cases which apply the same rule or law, including *Pacific Mills v. Nichols*, 72 F. (2d) 103, decided by the United States Circuit Court of Appeals for the First Circuit, *U. S. ex rel Botany Worsted*

Mills v. *Helvering*, 89 F. (2d) 848, decided by the United States Court of Appeals for the District of Columbia, *J. E. Ervine & Co.* v. *U. S.*, 10 F. Supp. 1019, decided by the United States Court of Claims, and others.

In *U. S. ex rel Botany Worsted Mills* v. *Helvering*, the rule of law is well stated. After citing the Second Circuit in *Watts* v. *U. S.*, 82 F. (2d) 266, the Court said:

> "In that case Judge Chase said: 'In *McKesson & Robbins* v. *Edwards*, 57 F. (2d) 147, we had before us the effect upon the time for bringing suit of the action of the commissioner in reopening a refund claim after having rejected it. There, as here, there had been a reconsideration on the merits and not merely a determination as to whether or not to reconsider. We held that while the commissioner was reconsidering the claim was to be treated as sub judice; the limitation of the statute not beginning to run until the decision upon reconsideration.' Other cases to the same effect are *Southwestern Oil & Gas Co.* v. *U. S.* (D. C.) 29 F. (2d) 404, affirmed (C. C. A.) 34 F. (2d) 446, certiorari denied November 25, 1929, 280 U. S. 601, 50 S. Ct. 82, 74 L. Ed. 646; *Jones* v. *United States* (Ct. Cl. 1933), 5 F. Supp. 146; *American Safety Razor Corporation* v. *United States* (Ct. Cl. 1934), 6 F. Supp. 293; *Pierce-Arrow Motor Car Company* v. *United States* (Ct. Cl. 1935), 9 F. Supp. 577.
>
> "Applying the rule of the cases cited to the instant case, it is clear that the Commissioner's conduct in reconsidering the claim left open the question of the right to refund, until he should 'finally decide' that question. His action was the equivalent of saying, 'As a result of your protest I will consider the question in the light of new facts and in the meantime and until I reach a conclusion my former action will stand for naught.' . . ."

It is, therefore, a well-established rule of law that a reopening and a reconsideration by a Federal administrative agency starts the statute of limitations to run over again. The contention of the Government that, since the Commission's second decision did not differ from the first decision,

the statute of limitations did not start to run anew is fallacious. In every case herein cited the plaintiff's claim for refund was rejected in the first decision of the Commissioner, and such rejection was repeated a second time after reopening. As a matter of fact in the case of *J. E. Ervine & Co.* v. *U. S.*, 10 F. Supp. 1019, the claim was twice reopened and three times rejected. The court held that the statute of limitations began to run anew from the third and final rejection.

CONCLUSION

As to the Defendant's Conclusion:

On mistaken premises the defendant in the conclusion of its brief asserts ten propositions, none of which the plaintiff believes to be sound. To avoid repetition it refers the Court to the pages of this brief wherein each of the said propositions is refuted.

Page

(A) Whether the lower Court usurped the functions of the Commission 12, 20-70

(B) Whether the Court of Claims nullified the Commission's findings and substituted its own unauthorized ideas of fair and reasonable compensation 27

(C) Whether the Court of Claims disclaimed making any finding that there was not a taking within the protection of the Fifth Amendment, or, to the contrary, held, as the defendant admits, that the compensation described was confiscatory 25

(D) Whether the rates ordered by the Commission are the same as paid to comparable railroads 80

(E) Whether there is merit in the contention that the plaintiff "fully resisted any attempt to relieve it of the business of which it complains" 36, 86, 90

(F) Whether there is merit in the contention that there is no valid answer to the Commission's finding that the mail service pays more for other passenger services than for mail service 27, 83

(G) Whether there is merit in the contention that if the judgment of the lower Court is affirmed, the plaintiff will be paid almost double what is paid to any other railroad 80

(H) Whether there is merit in the contention that the judgment of the Court of Claims is beyond its power 20

(I) Whether there is merit in the contention that the judgment of the Court of Claims is not warranted by the facts 15, 26, 27, 61, 66

(J) Whether there is merit in the contention that the judgment of the Court of Claims is not warranted by the law 24, 27, 17

As to the Plaintiff's Conclusion:

The plaintiff's conclusions can be briefly stated thus:

(1) Except on the question of interest, the decision of the lower Court is entirely consonant with the findings of fact, and the findings of fact are entirely consonant with the evidence, as is evident from the fact that the petitioner has failed to assign a single direct specification of error to any one of the numerous special findings of fact upon which rests the decision of the lower Court.

(2) The contention, as a proposition of law that the cause of action was one for the review of legislative rate making, hence the lower Court lacked jurisdiction is in direct conflict with the decisions of this Court in *U. S.* v. *New York Central*, 279 U. S. 76, and *U. S.* v. *Griffin*, 303 U. S. 226; and is in contradiction of its own previous position, and is contrary to the principle of res judicata, since the point was expressly settled in the latter case between the same parties on the same cause of action.

(3) Since this a taking of property within the particular or the Fifth Amendment by statutory authority the plaintiff is entitled to have interest added to the award.

WHEREFORE, the plaintiff respectfully prays that in respect to the award of the principal sum of $186,707.06 the

judgment of the lower Court be affirmed, but that the cause be remanded to the lower Court with a direction to add interest in order to make its compensation full and complete.

Respectfully submitted,

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Dated Washington, D. C.
February 2, 1949.